IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 30/04/2003

Coram

Honourable Mr. Justice N.V. BALASUBRAMANIAN
and
The Honourable Mr. Justice T.V. MASILAMANI

A.S. No.1050 of 1988

1. Rahael
2. Jabamony
3. Rajitham
4. Charlet .. Appellants

-Vs-

1. Palammal
2. K.Nesayyan (died)
3. Bright
4. Thomas
5. Lilly Bai
6. Vimala Bai
7. Sugantha Bai
8. Devasundar
9. Samsundar
10.Jeya
11.Hemalatha .. Respondents
[R3 to R11 were brought on record as L/Rs.
of R2 as per Order of Court dated
21.4.2003 in CMP Nos.6480 & 6481 of 2002]

Appeal Suit against the judgment and decree made in O.S. No.57 of 19
85 dated 4.1.1988 on the file of the District Judge, Kanniyakumari at
Nagercoil.

!For Appellants : Mr.S.S.Mathivanan

^For Respondent-1 : Mr.S.V.K.Thampi

:JUDGMENT

T.V. MASILAMANI, J.

The defendants 1 to 4 are the appellants herein. The first
respondent/plaintiff filed a petition under Section 264 of the Indian

Succession Act before the District Court, Kanniyakumari District at Nagercoil for granting order of probate of the last Will of K.Thangayyan bequeathing the properties in her favour. Since the petition was contested, a suit was registered and tried by the District Judge, Kanniyakumari at Nagercoil.

2. The first respondent/plaintiff's case before the trial Court may be briefly stated as follows:-
The plaint schedule properties originally belonged to the brothers, K.Nesamony, K.Nesayyan and K.Thankayyan and out of the plaint schedule items, items 1 and 2 are garden lands and items 3 to 5 are paddy lands. There had been a partition about 20 years prior to the suit among the three brothers. Item No.3 was divided into two plots of which the western 2/3rd share had been in possession of Thankayyan and his brother Nesayyan, the 5th defendant herein, and the eastern 1/3rd share has been in possession of Nesamony and presently with the defendants 1 to 4, his legal heirs. Item Nos.4 and 5 were partitioned and in the partition, the northern 2/3rd share had been taken by Thankayyan and the 5th defendant and the southern 1/3rd share was given to Nesamony, the husband of the 1st defendant and the father of defendants 2 to 4. Thankayyan was a bachelor and he lived in the house of Nesayyan, the 5th defendant. While he was alive, Thankayyan executed his last Will and testament in favour of the plaintiff, the wife of Nesayyan on 11.10.1979 in a sound and disposing state of mind and he died later on 7.12.1979 at his residence. The testator was a Christian and the plaintiff and the defendants 1 to 5 were also Christians. Because of the Will, the plaintiff obtained a valid title and ownership of the properties of Thankayyan and she has been enjoying the same along with her husband. The defendants 1 to 4 did not inherit any share in the properties of late Thankayyan on account of the Will in favour of the plaintiff. The defendants 1 to 4 filed a suit in O.S.No.193 of 1981 before the District Munsif Court, Padmanabhapuram for partition in respect of the share of Thankayyan and the plaintiff and the 5th defendant herein are parties to the same. She claimed her share on the basis of the Will dated 10.11.1979 in the said suit.

3. The contentions raised by the appellants/defendants 1 to 4 in the written statement are briefly as follows:-
Out of 4 acres and 14 cents in item Nos.1 and 2, Nesamony, Nesayyan and Thankayyan jointly sold 1 acre and37 cents and there was only 2 acres and 77 cents remaining with them. Later, Nesamony sold 27 cents and Thankayyan sold 32 cents out of their share. The contention that there was oral partition in respect of item Nos.3 to 5 is false. The brothers were in joint possession of the properties. Thankayyan did not execute any Will as alleged in the plaint and the document filed into the Court is a forged and spurious one. Thankayyan died intestate and thereupon, his legal heirs inherited the properties. It is true that the suit in O.S.No.193 of 1981 for partition of the plaint schedule properties had been filed by Nesamony and therefore, the present suit has been filed as a counter blast to the said suit by the wife of the 5th defendant setting up a false Will at the instance of her husband. Hence, there can be no probate granted in favour of the plaintiff, since there is no Will.

4. The 5th defendant remained exparte. In the above circumstances, the following issues were framed for trial.

(1) Whether the Will dated 11.10.1979 is a genuine Will executed by Thankayyan?
(2) Whether the plaintiff is entitled to get probate of the Will?
(3) To what relief?

5. The trial Court having analysed the evidence adduced on either side and after hearing the arguments advanced by them held that Thankayyan executed his last Will dated 11.10.1979 in a sound and disposing state of mind and therefore, the plaintiff is entitled to get probate of the Will and the suit was decreed as prayed for without costs. Hence, the appeal.

6. The point for consideration is whether Thankayyan executed the last Will and testament under Ex.A-1 in favour of the first respondent/plaintiff in a sound and disposing state of mind?

7. The point:- The provision under Section 68 of the Indian Evidence Act prescribes that the execution of a Will can be proved by calling an attesting witness in proof of the execution by the person by whom it purports to have been executed if it is specifically denied. The learned counsel for the appellants has argued at the outset that the alleged Will Ex.A-1 dated 11.10.1979 is not a true and valid testament executed by Thankayyan and therefore, the learned District Judge ought to have held that Ex.A-1 was fabricated only after filing of the partition suit in O.S.No.193 of 1981 on the file of the District Munsif, Padmanabhapuram. It is no doubt true that the said Thankayyan died on 7.12.1979 and therefore, it has to be seen from the evidence whether the execution of Ex.A-1 has been proved in accordance with law. Ex.A-1 had been written in Malayalam language and a transliteral copy is enclosed for the sake of convenience. Firstly, the learned counsel for the appellants has placed reliance on the evidence of P.W.2, Balaswamy Nadar, the scribe of the said document, in support of his first contention that the execution of the Will under Ex.A-1 is not proved by the propounder of the Will, namely, the first respondent/plaintiff in this case. It is true that P.W.2, Balaswamy Nadar turned hostile and therefore, he was cross examined by the first respondent/plaintiff in this case. As has been argued rightly by the learned counsel for the first respondent, the evidence of P.W.2 is not conclusive one to decide the case in her favour for the simple reason that P.W.3 Sankaran and P.W.4, Vathasalam, attestors have given evidence to prove the factum of attestation of the Will. However, it is necessary to find out whether P.W.2, Balaswamy Nadar is a reliable witness in this case. Though he has stated that he had written Ex.A-1 as a scribe, he would say that P.W.5 Nallathambi gave a draft and directed him to write the document. On the part of P.W.5, Nallathambi, he has denied categorically that he had ever met P.W.2 on the date of Ex.A-1 nor had he given a draft to him for writing the Will under Ex.A-1. According to him, he was also a scribe at Thiruvattar and after bifurcation of the jurisdiction he had shifted his office to Verkilambi from November, 1975. He has stated further that he did not know P.W.1 , Palammal and that he did not hand over any draft to Thankayyan so as to get the Will

written by P.W.2, Balaswamy Nadar. In this connection, it is urged by the learned counsel for the first respondent that the appellants failed to cross examine P.W.5 on material aspect with reference to his evidence on the whole, whereas only a suggestion has been put to him that there are many scribes in the name of Nallathambi working in Kanniyakumari District. and therefore, it is argued by him and in our opinion rightly that the testimony of P.W.5 on the whole does not help advance the case of the appellants in any event.

8. The sheet anchor of the case of the appellants seems to be the evidence of P.W.2 and in this connection, the learned counsel for the appellants has pointed out the evidence of P.W.2 that he had written Ex.A-1 in 1980 ante-dating the same to 11.10.1979, that he had signed in the third page of the document after completing the same leaving enough space for the witnesses to sign thereafter, and that he had not seen Thankayyan signing the Will. Hence, it is urged on the part of the appellants that Ex.A-1 is an ante-dated document created after the death of Thankayyan. On the contrary, the learned counsel for the first respondent would urge that in the cross-examination, after treating P.W.2 a hostile witness, he would admit that in page 3 of the document, he had written the name of Thankayyan Nadar as well as the name and address of one witness and he had not written the name and address of another witness and that the document would appear to have been written and executed by the testator, attested by the witnesses and thereafter completed by the scribe. Hence, it is urged by the learned counsel for the first respondent that the oral evidence of P.W.2 as against the document is unreliable and therefore, he has been rightly treated as a hostile witness. As has been pointed out on the side of the first respondent, P.W.2 has gone to the extent of stating that he used to write ante-dated documents at the request of the parties to the same, that he is a licensed document writer bearing licence No.220 from 1969 onwards and that at the time of writing Ex.A-1 he was not having any licence. Hence, it is urged by the learned counsel for the first respondent that the trial Court has held that his evidence is unreliable, as he has given evidence only to support the case of the appellants. On a careful consideration of the evidence of P.W.2 on the whole in the light of the evidence of P.W.5, we are of the opinion that the finding of the trial Court in this respect is reasonable. However, since P.W.2 being a licensed scribe has contravened the rules and regulations governing the licence, as he has affirmed under oath that he used to write ante-dated documents, necessary action against him has to be initiated by the appropriate authority.

9. Eschewing the evidence of P.W.2, the evidence of P.W.3, Sankaran and P.W.4 Vathsalam has to be scrutinised whether the same has proved the execution of Ex.A-1 by Thankayyan in a sound and disposing state of mind. The learned counsel for the appellants has argued with reference to the testimony of P.Ws.3 and 4 that the same are riddled with controversy. Firstly, he would point out that both of them have asserted that the executant Thankayyan and they have also signed by the same pen in Ex.A-1 and he has adverted the attention to Ex.A-1 containing the signatures of attestors and the scribe in different inks. In this connection, the learned counsel for the first respondent has pointed out rightly that the evidence of witnesses with reference to a document executed about 8 years prior to the date of deposition

in court cannot be expected to satisfy the mathematical precision and accuracy. Nextly, regarding the sound and disposing state of mind of Thankayyan, P.W.3 has stated that since he was ailing, P.W.2 had written his name and thereafter, Thankayyan signed therein. But, on the other hand, P.W.3 has answered the question put by the Court in the negative whether Thankayyan was suffering from ailment very much on the date of executing Ex.A-1 and therefore, the learned counsel for the appellants would contend that the above said evidence exposes the material controversy between P.W.3 and P.W.4. In this context, the learned counsel for the first respondent has referred to the entire evidence of P.W.3 and P.W.4 and argued that there is no contradiction between their testimony for the simple reason that both of them have conceded that Thankayyan was ailing to some extent. Hence, we are unable to agree with the contention of the appellants' counsel in this respect. Nextly, it is urged by the appellants' counsel that the discrepancy in the testimony of P.W.3 and P.W.4 regarding the person accompanying Thankayyan after execution of Ex.A-1 to hand over the same to P.W.1, Palammal is very much material on this aspect. It is no doubt true that P.W.3 would contend both of them accompanied Thankayyan to the house of P.W.1 where Thankayyan handed over the Will to P.W.1; whereas P.W.4 would contend except P.W.3 both of them went to P.W.1's house and handed over the document. Here also, it is relevant to note that the testimony given in the trial Court by the witnesses after several years from the date of execution of Ex.A-1 could not have been a memory test held with reference to the execution of the document and therefore, in our opinion, the fact that after execution of Ex.A-1, it was handed over by Thankayyan to P.W.1 cannot be disputed at this point of time. Apart from the above said minor discrepancy in the evidence of P.Ws.3 and 4, no circumstance has been elicited in their cross-examination to show that Ex.A-1 was not executed by Thankayyan in accordance with law.

10. The testimony of P.Ws.3 and 4 discloses that after writing the document by P.W.2, the testator had signed therein in their presence and the attestation by both P.W.3 and 4 was made in the very presence of the testator under Ex.A-1. In this context, the learned counsel for the first respondent has cited the decision in N.KAMALAM v. AYYASAMY (AIR 2001 S.C. 2802) in support of his contention that as per Section 63 of Succession Act, the evidence of P.Ws.3 and 4 is sufficient to prove the execution of Ex.A-1 and that their evidence cannot be equated with that of the scribe, P.W.2 herein. Having regard to the ratio of the said decision and in view of the evidence of P.W.2, who has admitted candidly that he had completed the document and signed therein and since the evidence of a hostile witness can also be looked into partly, such testimony would go to show that the Will under Ex.A-1 was executed in accordance with law.

11. The next contention of the learned counsel for the appellants that the signature of Thankayyan in Ex.A-1 was forged to create the Will as a counter blast to the suit in O.S.No.193 of 1981 (vide) Exs.B-4 and B-5. In this connection, it has been rightly pointed out by the learned counsel for the first respondent that P.W.1 in O.S.No.193 of 1981, who has given evidence under Ex.B-5 and who is arrayed as second defendant in this case, has been examined in this suit as D.W.1 and his evidence coupled with Ex.B-5 do not

improve the case of the appellants in any way. Therefore, we are of the opinion that Ex.B-5 is of no consequence with reference to the case of the appellants. Similarly, P.W.1 was not a party to the said suit as evident from Ex.B-4 and her husband, the 5th defendant herein, was the first defendant in the earlier suit. It is therefore argued rightly by the learned counsel for the first respondent that there is no iota of evidence to show that Ex.A-1 was created as a counter blast to that suit.

12. The learned counsel for the appellants has relied on Exs.A-1, A-5, B-1, B-2 to show that since Thankayyan was in the habit of writing his name in the document in Malayalam and thereafter sign therein, he could not have executed Ex.A-1. In this respect, D.W.1, Jebamony, 2nd defendant's evidence to that effect is relied upon by him. In this context, P.W.2, the scribe, has stated that he had written the name of Thankayyan in Ex.A-1 and as has been pointed out above, it may be due to the slight ailment of the testator that P.W.2 had written his name before he signed therein. The documents under Exs.A-5, B-1 and B-2 which had also been written in the vernacular disclose that Thankayyan had written his name and signed therein and therefore, it is urged by the learned counsel for the appellants that a strong suspicion arises in connection with the execution of Ex.A-1. As referred to above, the ailment of the testator could be the probable reason for the scribe P.W.2 to write the name and thereafter obtain the signature of Thankayyan. Hence, the evidence of P.W.3 and P.W.4 with reference to the signature of Thankayyan in Exs.B-1 and B-2 is of no consequence for the simple reason that they are not connected with those documents inasmuch as they are not expert witnesses. On the contrary, the evidence of P.W.1, the plaintiff herein, who is conversant with the signature of Thankayyan to the effect that Exs.B-1 and B-2 contain his signatures assumes significance. It follows necessarily that the admitted signatures of Thankayyan in Exs.A-5, B-1 and B-2 have to be compared with that of the disputed signature in Ex.A-1 and if such comparison is made, it would lead to the only conclusion that in all probability, Thankayyan should have signed in Ex.A-1 in view of the similarities of the signatures under comparison. Hence, the conclusion of the trial Court after comparison of the signatures of Thankayyan in Exs.A-1, A-5, B-1 and B2 to the effect that the admitted signatures tally with the signature in Ex.A-1 and that therefore, Ex.A-1 could not have been created after the life time of Thankayyan has to be upheld.

13. The learned counsel for the appellants has relied on the circumstance that Thankayyan executed the Will Ex.A-1 to the exclusion of his brother's sons in favour of P.W.1, wife of another brother as a strong piece of evidence in favour of the appellants. On the contrary, the learned counsel for the first respondent has adverted to the transliteral copy of Ex.A-1 showing that since Thankayyan was living alone, P.W.1 had taken care of him, that she had helped him during his illness in taking him to the hospital for treatment, that she was living with him with love and affection and that therefore, he executed his last will and testament in her favour in a sound and disposing state of mind, in support of his argument that such recitals coupled with the evidence of P.W.1 would go to show that it was natural for Thankayyan to execute the Will in her favour. According to P.W.1, the

plaintiff in the suit, Thankayyan was living alone after getting divorce from his wife with her family inasmuch as he had no issues, he executed the Will in her favour. Similarly, her evidence that she had seen his signatures even prior to the execution of Ex.A-1 and that Thankayyan handed over Ex.A-1 Will to her in the evening of 10.11.1979 in the presence of P.Ws.3 and 4 would go to show and prove that her testimony is cogent and convincing.

14. The learned counsel for the first respondent has adverted our attention to yet another circumstance borne out by documents Exs.A-5, B-1 and B-2 to show that both Thankayyan and Nesayyan were dealing with their share in the family properties jointly to the exclusion of other brother, Nesamony, the husband of the first defendant in the suit in support of his contention that Thankayyan had every reason to prefer P.W.1 as legatee under the Will Ex.A-1. It is in these circumstances, this Court agrees with the finding of the trial Court that preference of P.W.1 to the exclusion of other brother's heirs of Thankayyan is not a suspicious circumstance so as to affect the genuineness and validity of Ex.A-1.

15. The appellants' counsel has put forth the argument that the direction in Ex.A-1 to the effect that the obsequies after the death of Thankayyan should be performed by P.W.1 is unnatural and that therefore, it is another strong suspicious circumstance in favour of the appellants. As has been rightly argued by the learned counsel for the first respondent, since the parties to the suit are Christians by faith, it is not uncommon for womenfolk to perform the obsequies and therefore, we are unable to agree with such contention also. Nextly, it is urged by the learned counsel for the appellants that even though Ex.A-1 was alleged to have been executed nearby the office of the Sub Registrar, non-registration of the document would go to show that the same was created later. In answer to such contention, the learned counsel for the first respondent has drawn our attention to the decision in ISHWADEO NARAIN SINGH v. KAMTA DEVI (AIR 1954 S.C. 280) for the proposition that since the Will is not compulsorily registrable under law, non-registration of the same is of no consequence and having regard to the ratio of decision in the light of the evidence in this case, non registration of Ex.A-1, Will was not warranted and therefore, we are inclined to accept the contention of the learned counsel for the first respondent in this respect. On the contrary, the decision in RAJESH v. RAJA (1994 (I) M.L.J. 216) for the same proposition of law relied on by the learned counsel for the appellants is also in favour of the respondent for the reason that the genuineness of the Will Ex.A-1 has been proved by cogent and acceptable evidence in this case.

16. Similarly, the learned counsel for the appellants would urge that the interregnum from the date of Ex.A-1 and that of the demise of Thankayyan is so short that the same creates another cloud of suspicion. As has been referred to above, the evidence of P.W.1, P.W.3 and P.W.4 has established that on the date of Ex.A-1 Thankayyan was hale and healthy enough to travel to and from the place of execution of the document and therefore, we are unable to subscribe to such contention. The learned counsel for the appellants has relied on the decisions in RAMCHANDRA v. CHAMPABAI (AIR 1965 S.C. 354), G.THATAIAH v. VENKATA SUBBAIAH (AIR 1968 S.C. 1332), VYJAYANTHIMALA BALI v.

RATTAN CHAMAN BALI (1990-1-L.W.27) and KALYAN SINGH v. CHHOTI (AIR 1990 S.C. 396) in support of the contention raised by him referred to supra, in connection with the burden of proof of the execution of Ex.A-1 and dispelling the suspicious circumstances by the respondent. The proposition of law laid down in the said decisions is not in controversy and since each case has to be decided on the basis of the peculiar facts and circumstances involved therein, we are of the opinion that the execution of the last Will and testament under Ex.A-1 by Thankayyan has been proved by adducing satisfactory evidence in this case. In the above circumstances, the decision of the trial Court that the first respondent is entitled to the probate of the Will Ex.A-1 as prayed for has to be upheld.

17. In the result, the appeal is dismissed confirming the decree and judgment of the trial Court. However, there will be no order as to costs.

Index: Yes
Website: Yes
dpp

To

1. The District Judge, Kanniyakumari at Nagercoil.
2. The Section Officer, V.R.Section, High Court, Madras.

Office to note:
The District Judge, Kanyakumari is directed to forward a copy of the judgment of this Court to the District Collector, Kanyakumari or any appropriate authority with a direction to initiate proceedings against Balaswamy Nadar (P.W.2), the document writer bearing licence No.220, as he has stated in his evidence that he is having the practice of writing ante-dated documents.
B/o
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